Competition Law and Environmental Protection in Europe; Towards Sustainability?
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Merger Control
10.1 Introductory remarks

Contrary to the ECSC Treaty the EC Treaty did not envisage a Community competence to control mergers. Only with the Continental Can case was some sort of make shift concentration control regime acknowledged by the Court. However, it took the EC and primarily the Commission, until 1990 to put in place an effective ex ante merger control regime. This happened with the entry into force of the Merger Regulation. Since then Regulation 1310/97 has amended it. Below we shall address the rather technical details of this Regulation only very briefly. Suffice it, at this point, to say that the Merger Control Regulation was from the very outset on indented to be a pure competition-orientated instrument. However, a number of features may indicate a role for non-competition issues nonetheless. Below, we shall first provide a general outline of the Merger Regulation after which we will turn our attention to the features that suggest some role for considerations other than competition.

10.2 An outline of the Merger Regulation and its application

Essentially the part of the Merger Regulation that is not concerned with notifications, time-limits and other procedural issues can be divided into a number of jurisdictional and a number of substantive provisions. The jurisdictional clauses concern the question whether an operation is to be notified to the Commission. Basically this hinges on the concept of a concentration and certain turnover thresholds that determine whether or not the transaction is of a 'Community dimension'.

Under the Merger Regulation companies are to notify to the Commission any plans for concentrations with a Community dimension before these effectuated. The concept of a concentration encompasses mergers strictu sensu (Article 3(1)(a) and the situation where one or more firms acquire control over one or more other firms (Article 3(1)(b). In order to have a Community dimension the undertakings concerned must pass a number of turnover thresholds (Article 1(2) and (3)).

2 Regulation No. 4064/89 On the Control of Concentrations Between Undertakings, OJ 1989 L 395/1.
3 Regulation No. 1310/97 Amending Regulation 4064/89 On the Control of Concentrations Between Undertakings, OJ 1997 L 180/1. The Commission is currently engaged in the so-called Merger Review operation that will further change the concentration control in the EU. The Commission's proposal for a new Regulation to replace Regulation 4064/89 as well as 1310/97 can be found in OJ 2003 C 20/4.
If the operation constitutes a concentration and is of Community dimension, the Commission will appraise it on the basis of the Merger Regulation. This is the actual substantive part of the Merger Regulation. The test in this respect is provided in Article 2 and hinges on whether the concentration is 'compatible with the common market'. This again pivots on whether or not a dominant position is created or strengthened as a result of which effective competition in the common market would be significantly impeded (Article 2(2) and (3)). The concept of dominance referred to here is identical to that within the meaning of Article 82 EC. As we have seen above, establishing dominance is a fairly technical exercise where theoretically no discretion exists for the Commission. At best, environmental considerations can play a role in the market definition leading up to the appraisal of dominance.

This has happened in a number of cases concerning the market for waste recycling. In *Rhone Poulenc Chimie/SITA* the envisaged joint venture should become active on the market for the recycling of special (toxic) industrial waste. In assessing the markets concerned, the Commission took account of the special nature of the waste and environmental regulations in place. Similarly, in *Suez Lyonnaise des Eaux/BFI*, the Commission distinguished between the market for the treatment of normal waste and that for the treatment of special industrial waste. Environmental considerations have played a role in market definition also outside the recycling context. In *Orkla/Volvo*, the Commission considered Norway to be a separate geographical market because of, *inter alia*, an environmental taxation scheme with regard to packaging.

Pursuant to Article 2(4), joint ventures that fall within the scope of the Merger Regulation while leading to a coordination of the competitive behaviour of the parents will be screened in the light of Article 81(1) and 81(3). This effectively bestows upon the Merger Regulation the same possibilities for an integration of environmental concerns as exist with regard to Article 81 EC. Again, the reader is referred to the relevant paragraphs in this chapter.

This short sketch of the main features of the Merger Regulation confirms the statement made above that it is a pure competition oriented instrument that, unlike for example Article 81, does not allow for a restriction of competition to be balanced by a benefit of some sort. However, as was noticed above, there are a number of provisions in the Merger Regulation that may qualify this statement.

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7 Case No. IV/M.266, CELEX No. 392M0266.
8 Case No. IV/M.1059, CELEX no. 397M1059.
10.3 Possibilities to take non-competition factors into account

In the introductory paragraph we have already indicated that the possibilities to take non-competition factors into account are small as it is considered to be an instrument geared only to maintaining competition. This, however, does not mean that non-competition considerations were from the outset out of the picture nor does it mean that such factors have no role to play in the current form of the Regulation.

Merger control in the United States, for example, allows for a so-called 'efficiency defence'. Under this line of reasoning a merger that restricts competition can be allowed because of overriding efficiency gains. The result of this is of course that non-competition considerations enter the equation. It should, therefore, not come as a surprise that, despite the fact that the systems for merger control then functioning in EC member states did not allow for such a defence, that initial proposals for the Merger Regulation expressly provided for a balancing act. The 1988 and 1989 drafts both contained a provision explicitly allowing the Commission to authorise mergers if these 'contribute to the attainment of the basic objectives of the Treaty in such a way that, on balance, their economic benefits prevail over the danger they cause to competition'. The scope of this provision would indeed probably even be wider than that of Article 81(3).

This provision, as the current version of the Merger Regulation shows, did not make it to the final version. Moreover, the then Commissioner responsible for competition, Sir Leon Brittan, has made it clear beyond doubt that the Merger Regulation would be concerned with maintaining competition and nothing else. Nevertheless, the Regulation still contains some ambiguities in this respect. The first of these is the thirteenth recital of the preamble to the Regulation in which it is stated that:

'Whereas it is necessary to establish whether concentrations [...] are compatible or not with the common market from the point of view of the need to maintain and develop effective competition; whereas, in doing so, the Commission must place its appraisal within the general framework of the achievement of the objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130A [now Article 158]'

It should be noted that this recital is not reflected in the operative part of the Regulation. From a legal perspective its value therefore seems limited. However, the operative part of the Merger Regulation is not completely silent with regard
to non-competition factors and the role they play in the Commissions application of the Regulation. According to Article 2(1)(b) of the Merger Regulation the Commission, in assessing a concentration, shall take into account

‘the development of technical and economic progress provided that it is to the consumers’ advantage and does not form an obstacle to competition’.

Thus, the thirteenth recital taken together with Article 2(1)(b) could be taken to mean that it is still possible for the Commission to take non-competition factors into account in giving the go-ahead for a merger that restricts competition.

However, we should immediately note that Article 2(1)(b) is not directly implementing the thirteenth recital. The obvious differences in wording between the two provisions already indicate this. Textually, Article 2(1)(b) looks more like an ‘amputated’ version of Article 81(3) of the Treaty than the thirteenth recital. Moreover, as regards the non-competition objectives that may play a role, Article 2(1)(b) nowhere refers to the ‘the objectives referred to in Article 2 of the Treaty’ but instead refers to technical and economic progress. These difficulties surrounding the legal status of the thirteenth recital (in connection with Article 2(1)(b)) has not kept the Court of First Instance from giving it an unusual, perhaps unexpected, role in the Nestlé/Perrier case.13

This case started when the Commission approved the takeover by Nestlé of Perrier subject to conditions.14 Two worker representation organisations brought actions for annulment of the Commission decision approving the takeover because of fears of job losses. The Commission was of the opinion that the organisations’ action was inadmissible because it considered that they did not have an interest in the procedure.15 This, in turn, was considered by the Commission to be the result of the fact that the primary purpose of the Merger Regulation was to maintain competition and not to take into account the social implications. Therefore, the Commission considered that it was not under any obligation to perform a detailed analysis of the employment concerns of each concentration. Only if the organisations are able to show prima facie that the concentration authorised by the Commission clearly runs counter to the objectives of Article 2 EC, would they be admissible.

The Court took a slightly different route. It considered that, pursuant to Article 2(1)(b) of the Regulation, the Commission was under an obligation to draw up ‘an economic balance’ that may ‘entail considerations of a social nature’.16 Furthermore, the Court, while confirming the ‘primacy given to the

16 Ibid., para. 39.

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establishment of a system of free competition’, appeared to hold the Commission under an obligation to ‘ascertain whether the concentration is liable to have consequences, even if only indirectly, for the position of the employees’. Matters, therefore, are not as simple as the Commission may have wanted them to be. There would appear to be an obligation on the part of the Commission to at least investigate the possibility of effects on employment. If this is taken a bit further, the conclusion could be that the Commission would be under a similar obligation with regard to environmental considerations. Environmental concerns feature just as prominently in Article 2 EC as do social considerations. Moreover, with regard to the environment, the integration principle enshrined in Article 6 EC would seem to put the Commission under an obligation to at least take such considerations into account.

Whatever may be of this interesting interpretation of the thirteenth recital, it must still be taken into account that the operative part of the Merger Regulation must, as far as the possibility of taking non-competition factors into account, content itself with Article 2(1)(b). Even though it looks like Article 81(3), we should not be tempted to think that this provision, like Article 81(3), allows the Commission balance a restraint of competition under the Merger Regulation with certain other (not necessarily competition-related) benefits. As always the sting is in the tail. The wording of Article 2(1)(b) and in particular the fact that it speaks of insofar as it ‘does not form an obstacle to competition’ seems to indicate that technical and economic benefits are irrelevant as soon as there is an obstacle to competition. This is in accordance with the statement made above, that the Merger Regulation is an instrument of pure competition policy.

Commission practice reaffirms this view of the Merger Regulation. In Danish Crown/Vestjyske Slagterier, the parties argued that the concentration would lead to increased efficiencies. The Commission pointed to the text of Article 2(1)(b) only to come to the conclusion that ‘the creation of a dominant position (...) therefore, means that the efficiencies argument put forward by the parties cannot be taken into account in the assessment of the present merger’. In MSG Media Service, the Commission objected to the creation of a joint venture. Again, the parties’ arguments concerning technical and economic progress were simply put aside as irrelevant since the operation was likely to lead to form an obstacle to competition.

16 Ibid., para. 38.
Finally, social considerations and the thirteenth recital have played a role in the Kali + Salz saga. In this case the Commission applied the ‘failing company theory’ and in doing so referred to the structural problems in former Eastern Germany. Advocate-General Tesauro was the only one to pay any attention to this issue. On the basis of the Nestlé/Perrier case he came to the conclusion that the Commission was right to take social considerations into account provided that these were subsidiary to the competition concerns involved.

Therefore, with regard to the possibility to take non-competition issues into account, Article 2(1)(b) is limited to those cases where there are no competition concerns in the first place. It may therefore be wondered what the use of this provision is in the first place.

A final interesting provision is to be found in Article 21(3) of the Merger Regulation. Pursuant to this provision ‘Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.’ The Regulation explicitly recognises ‘public security, plurality of the media and prudential rules’ as such legitimate interests. That this is an indicative list is made clear by the third paragraph of Article 21(3), which contains a procedure for the recognition by the Commission of other legitimate interest than those mentioned expressly. Such interests are to be communicated by the member state to the Commission. The Commission shall assess the compatibility of these interests with the general principles and other provisions of Community law.

This provision brings with it a number of interesting legal issues. Firstly, the question of what exactly the purpose of Article 21(3) is. Can it only be used to block concentrations that do not represent a problem on competition grounds or can it also be used to approve mergers? The wording of Article 21(3) appears to leave this point open. However, it is submitted that Article 21(3) can only be used negatively, i.e. to scrutinise and eventually prohibit a merger on grounds of legitimate interests while it has been authorised by the Commission. This follows from the system of the Merger Regulation whereby the Commission is the only authority to apply the Merger Regulation to operations falling within its sphere. The fact that Article 21(3) can only be used negatively makes it of limited interest for this research.

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24 Article 21(1) and (2) of the Merger Regulation.

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The list of legitimate interests recognised in Article 21(3) is only indicative and does not contain any reference to environmental considerations. The final paragraph of Article 21(3) entails a procedure to have other interests recognised. In this regard a second interesting point to notice is the fact that this provision speaks of 'interests other than those taken into consideration by this Regulation'. This seems to indicate that the technical and economic benefits of Article 21(3) cannot play a role for a second time within the confines of Article 21(3). This, however, does not rule out a role for environmental considerations as it may very well be that such considerations have not been taken into account pursuant to Article 21(3).

All in all, practice with regard to Article 21(3) is scant. In Newspaper Publishing the Commission took account of the fact that, on the basis of the Fair Trading Act, the Secretary of State had to grant formal consent because issues such as the accurate presentation of news and freedom of expression were involved. In the Thomson-CSF/RACAL case the Commission's press release indicated that it had taken account of the fact that the UK authorities intended to scrutinise the public security aspects involved. In Banco Santander Central Hispanico/A. Champalimaud the Portuguese Finance Minister blocked a concentration that fell within the scope of the Merger Regulation. As an exception to the general rule, the Commission interpreted Article 21(3) narrowly. It held that interests not listed in Article 21(3) itself had to be notified to the Commission in accordance with the procedure in the final paragraph of that provision. Since the interests on which Portugal sought to rely had not been notified, Article 21(3) did not apply. Furthermore, the protection of strategic and national interests was rejected as a legitimate interest within the meaning of Article 21(3) since it was in fact an example of discrimination on grounds of nationality.

Though it is very difficult to conceive such a situation, we shall now investigate whether national authorities can use Article 21(3) on environmental grounds. The Commission's interpretation of Article 21(3) in the BSCH/A. Champalimaud case does not seem to rule out the possibility of national authorities having another look from an environmental perspective at a concentration already authorised by the Commission. Environmental considerations do not feature among the interests recognised in the Regulation itself. Member states will therefore have to follow the procedure provided for in the final paragraph of Article 21(3). Essentially this requires that the member states communicate the interest to the Commission who will then assess the compatibility with the general principles and other provisions of Community law. As protection of the

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environment is a recognised interest in Community law, this should not need to be the stumbling block. From the Lyonnaise des Eaux/Northumbrian Water and BSCH/A. Champalimaud cases we learn that the Commission will positively assess compatibility with Community law when the basic rules of Community law as well as the principle of proportionality have been observed. In making this assessment, the Commission is likely to look at existing Community (secondary) law for guidance as to what constitutes a legitimate interest. Again, this does not have to make recourse to Article 21(3) impossible when environmental interests are involved.

In sum, the role for environmental considerations in the application of the Merger Regulation is, as was indicated at the beginning of this paragraph, weak to say the least. Such considerations play a role in the definition of the market. Furthermore, they could play a role of secondary importance under Article 2(1)(b) as technical or economic progress. The role that environmental considerations play in this respect is secondary at best and does not amount to an integration of environmental concerns. It is submitted that the Commission is under an obligation to integrate environmental concerns also in its application of the Merger Regulation. It is, however, also submitted that this should not be irreconcilable with the very limited role for environmental concerns in the Merger Regulation. It may be recalled that the primary test under the Merger Regulation is whether a dominant position is created or strengthened as a result of which competition is restricted. In this respect it should be pointed out that it is rather difficult to conceive a situation where the creation or strengthening of a dominant position would actually benefit the environment. The protection of the environment as well as the internalisation of external costs is probably best served in open and competitive market.

\[18\] Ibid., para. 34-37.